MALAYAN BANKING BHD

v.

WEMBLEY INDUSTRIES HOLDINGS BHD

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: 22-346-2009]
3 FEBRUARY 2012

CIVIL PROCEDURE: *Action - Limitation - Claim for outstanding monies - Loan facilities - Whether amount outstanding due under charge and secured - Whether relevant period of limitation 12 years under s. 21(1) Limitation Act 1953 - Whether s. 6(5)(b) Limitation Act 1953 applicable - Whether action of plaintiff time barred*

CONTRACT: *Conditional contract - Debt Restructuring Agreement ('DRA') - Provisions of DRA not implemented - Whether DRA had lapsed - Whether there was an express term that plaintiff would be at liberty to make demand on defendant for immediate payment - Whether there was clear and unequivocal admission of acknowledgment of debt within the meaning of s. 26(2) Limitation Act 1953*

The plaintiff's claim against the defendant was for the outstanding monies due and owing by the defendant to the plaintiff in relation to banking facilities granted to the defendant by the plaintiff's predecessor-in-title, PhileoAllied Bank (Malaysia) Bhd ("PhileoAllied Bank"). Briefly, the defendant had defaulted in the repayment of its facilities. The defendant entered into a Debt Restructuring Agreement ('DRA') dated 15 October 2004 involving the defendant and their financiers and creditors including the plaintiff. In Recitals (B) and (C) of the DRA and the body of the DRA in cl. 10.1 thereof, the defendant had acknowledged its indebtedness to its various financiers and creditors including the plaintiff. The provisions of the DRA was never implemented and the DRA lapsed as the conditions precedent set out therein were never fulfilled by the Cut Off date of 31 December 2004. It was an express term of the DRA that after its termination, each of the financiers and creditors in question including the plaintiff would be at liberty to make demand on the defendant for immediate payment of the amounts due from the defendant and to institute legal actions to recover the amounts due. The plaintiff thus through its solicitors made a demand by way of a letter of demand. The respondent, however, did not respond and

proceeded to file this action. In determining whether the plaintiff was entitled to its claims, the issues that arose were (i) whether the facilities and/or the amount outstanding was due under a charge or debenture and thus secured and hence the limitation was 12 years from date of accrual of cause of action; (ii) whether the Recitals (B) and (C) in question and cl. 10.1 survived the DRA that had not been carried through and indeed had lapsed and (iii) whether there was a clear and unequivocal admission acknowledgment of debt in Recital (B) and (C) and cl. 10.1 of the DRA within the meaning of s. 26(2) Limitation Act 1953 ('the Act').

Held (granting judgment to plaintiff):

(1) The indebtedness of the defendant was at all material times secured by a charge over the assets, properties and undertaking of the defendant hence the relevant period of limitation was 12 years under s. 21(1) of the Limitation Act 1953. Following s. 6(5)(b) of the said Act, the six years limitation period for actions founded on a contract was not applicable. The cause of action accrued from the expiry of the time specified for payment and that would have fallen on 2 June 1999. The date of filing of the suit being 10 September 2004, thus the action was well within the limitation period allowed under s. 21(1) of the Act. The action of the plaintiff was therefore not statute-barred. (paras 27, 28 & 30)

(2) It could not be said that there was never a Recital (B) and (C) and cl. 10.1 in the DRA. It only meant that the DRA could not be enforced because parties were released from their obligations under it. The expression in cl. 2.6(a) of the DRA "... as if this Agreement had never been entered into; ..." must be interpreted in the context of the clause which had reference to the plaintiff making a demand for "... immediate payment or repayment of all outstanding indebtedness due to it under or arising from the facilities ... together with interest thereon ...". In such context there was nothing impeding the plaintiff from so proceeding as if this DRA had never been entered into. Further, it did not make commercial sense to the plaintiff on the one hand to give extension of time for the defendant to pay based on the restructured facilities and on the other hand consenting to the defendant being able to dispute the amount said to be owing which amount was the

subject matter of the restructuring exercise. Hence, the Recitals (B) and (C) and cl. 10.1 of the DRA survived the termination of the DRA and the defendant was estopped from denying what was being acknowledged there when the plaintiff sued based on existing documents. (paras 56 & 57)

(3) The defendant's allegation of triable issues were not supported by contemporaneous objections or documents at the relevant period. The arguments raised were misconceived taking into consideration the terms of the Debt Restructuring Agreement, and clear admission of liability for the respective sums set out in the schedule. In light of the reasons given above, there was a fresh acknowledgment of debt in Recitals (B) and (C) and in cl. 10.1 within the meaning of s. 26(2) of the Limitation Act 1953. (paras 68 & 69)

Case(s) referred to:

CIMB Bank Berhad v. Goh Tai Pak & Anor [2009] 1 LNS 1320 HC ***(refd)***

Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd [2003] 3 CLJ 201 CA ***(refd)***

Good v. Parry [1963] 2 All ER 59 ***(refd)***

Jaafar Ibrahim v. Gan Kim Kin [1985] 2 MLJ 24 ***(refd)***

McDonald v. Dennys, Lascelles Ltd [1933] 48 CLR 457 ***(refd)***

National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***

Re Footman Bower & Co Ltd [1961] Ch 443 ***(refd)***

RHB Bank (Malaysia) Bhd v. MOCCIS Trading Sdn Bhd [2011] 1 LNS 278 HC ***(refd)***

RHB Investment Bank Bhd & Ors v. Plaza Rakyat Sdn Bhd & Anor [2011] 1 LNS 600 HC ***(refd)***

Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd [2005] 3 CLJ 825 FC ***(refd)***

Wee Tiang Teng v. Ong Chong Hooi & Anor [1978] 1 LNS 234 FC ***(refd)***

WTK Holdings Bhd v. Foo Sae Heng & Anor [2011] 5 CLJ 433 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 33(a), 108

Contracts Act 1950, ss. 33, 34, 35, 36

Limitation Act 1953, ss. 6(1), (5)(b), 21(1), (5), 26(2)

Rules of the High Court 1980, O. 33 r. 2

Other source(s) referred to:

JW Carter, *Breach Of Contract*, pp 437-438

Kim Lewison QC, *The Interpretation of Contracts*, 2nd edn, pp 275-276

Terence Prime & Gary Scanlan, *The Law of Limitation*, 2nd edn, Oxford University Press, p 68

A *For the plaintiff - Wong Chee Lin (Patricia Ng with her); M/s Skrine*
For the defendant - Puteri Shehnaz Majid (C H Cheong with her); M/s Cheah Teh & Su

Reported by Suhainah Wahiduddin

B

JUDGMENT

Lee Swee Seng JC:

C **Prologue**

[1] When does a fresh accrual of action arise from an acknowledgment of debt? This is particularly interesting here as the agreement containing the said acknowledgment in the recital is said to be as if the agreement had not been entered into if the conditions precedent are not met. Does that mean that there has been no acknowledgment at all such that if the plaintiff seeks to bring its cause of action after the normal six years for contract, the action is time-barred?

E **Parties**

[2] The plaintiff's claim against the defendant is for the outstanding monies due and owing by the defendant to the plaintiff in relation to banking facilities granted to the defendant by the plaintiff's predecessor-in-title, PhileoAllied Bank (Malaysia) Bhd ("PhileoAllied Bank"). The revolving credit facilities from PhileoAllied Bank and three other banks amounted to the principal sum of RM125 million. The facilities were secured by way of four separate debentures dated 10 July 1995 executed by the defendant charging all its assets, properties and undertaking in favour of the four lenders as security for its indebtedness. The loans from the other three banks were later novated to PhileoAllied Bank on 27 May 1997.

H **[3]** Following an amended vesting order dated 2 March 2011 granted by the Kuala Lumpur High Court, all the business of PhileoAllied Bank including the indebtedness of the defendant were duly vested in the plaintiff.

I **Problem**

[4] The defendant had defaulted in the repayment of its facilities and PhileoAllied Bank had by letters of demand dated 10 March 1998 and 24 March 1998 demanded payment of the entire facilities due and owing together with interest thereon.

[5] Attempts were made at restructuring the facilities. This finally led to the defendant entering into a Debt Restructuring Agreement ("DRA") dated 15 October 2004 involving the defendant and its subsidiary Plaza Rakyat Sdn Bhd ("PRSB") and their financiers and creditors including the plaintiff. The DRA is found at pp. 323-360 of Core Bundle 1.

[6] Both in recitals (B) and (C) to the DRA and the body of the DRA in cl. 10.1 thereof, the defendant had acknowledged its indebtedness to its various financiers and creditors including the plaintiff. See pp. 324 and 345A of Core Bundle 1. The defendant expressly acknowledged that it was indebted to the plaintiff in the sum of RM180,927,332 as at 31 December 2001, comprising a principal of RM125 million and interest of RM55,927,332. There was also the letter from the defendant's auditors to the plaintiff and the plaintiff's reply on the amount outstanding at pp. 461-470 of Core Bundle 2.

[7] The provisions of the DRA was never implemented and the DRA lapsed as the conditions precedent set out therein were never fulfilled by the cut off date of 31 December 2004.

[8] It was an express term of the DRA that after its termination, each of the financiers and creditors in question including the plaintiff would be at liberty to make demand on the defendant for immediate payment of the amounts due from the defendant and to institute legal actions to recover the amounts due.

[9] The defendant made a general announcement on the Bursa Malaysia website that the conditions precedent to the DRA had not been complied with before the cut off date of 31 December 2004 and unless the cut off date was extended (which was not) the DRA would lapse and cease to have effect from 1 January 2005 onwards and lenders may take action to recover the amounts owing to them at any time. These are found at pp. 474-476 of Core Bundle 2. The defendant also stated for the record, the amount owing to the plaintiff as at 31 December 2004 in the said announcement.

[10] The plaintiff through its solicitors Skrine made a demand by way of a letter of demand dated 22 December 2008 for the sum of RM319,978,372.25 as at 30 November 2008 with interest thereon at the rate of 2.15% per annum above the Bank's Base Lending rate from 1 December 2008 until date of payment and costs on a solicitor and client basis. The letter of demand is at pp. 361-363 of Core Bundle 1.

[11] There being no response from the defendant, the plaintiff proceeded to file this action on 24 February 2009.

Prayer

[12] The plaintiff claimed for the above in its statement of claim. On the date of trial on 15 November 2011, parties informed the court that they are all agreed on the facts and that no witnesses will be called. The learned counsel for the defendant, Puteri Shehnaz Majid, also confirmed that she was not challenging the correctness of the sum claimed but only that the plaintiff's claim was time-barred. The procedure adopted is in line with O. 33 r. 2 of the Rules of the High Court 1980 (RHC) which reads:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the matter in which question or issue shall be stated.

[13] With consent of the parties the court gave direction for the following questions to be addressed which determination will dispose of the issue as to whether the plaintiff was entitled to its claims:

(1) Whether there was a clear and unequivocal admission acknowledgment of debt in recital (B) and (C) and cl. 10.1 of the DRA within the meaning of s. 26(2) Limitation Act 1953;

(2) Whether the recitals in question and cl. 10.1 survive the DRA that had not been carried through and indeed had lapsed and;

(3) Whether the facilities and/or the amount outstanding is due under a charge or debenture and thus secured and hence the limitation is 12 years from date of accrual of cause of action.

Principles

[14] Both parties are agreed that ordinarily under s. 6 of the Limitation Act 1953 the cause of action of the plaintiff would have accrued on 29 January 2000 as that was the date of repayment in one lump sum of the loan outstanding under the Supplemental Agreement dated 29 January 1999 wherein the amounts outstanding under various revolving facilities were converted into a term loan and made payable a year after. If that was the case, limitation would have set in on 19 January 2006.

[15] However if the 12 year limitation period applies by virtue of s. 21(1) of the Limitation Act 1953 because the loan is secured on a mortgage or charge, then limitation would not have set in at all.

[16] Alternatively, even if the six year limitation applies, if this court upholds the argument of the plaintiff that there has been a fresh acknowledgement of debt by the DRA of 15 October 2004 then limitation would only set in on 15 October 2010 and the writ having being filed on 24 February 2009 was filed within time.

[17] A few dates must then be kept in the fore-front of our mind to appreciation the ramification that follows from the arguments advanced:

29 January 1999	Date of Supplemental Agreement agreeing to payment in a lump sum a year later.
29 January 2000	Date of accrual of cause of action.
15 October 2004	Date of DRA and fresh acknowledgment of debt.
29 January 2006	Date limitation sets in if six years limitation applies and not 12 years.
24 February 2009	Date writ was filed.

Whether The Relevant Limitation Period Is 12 Years Under Section 21(1) Limitation Act 1953

[18] Section 6(1) of the Limitation Act 1953 provides:

> 6. Limitation of actions of contract and tort and certain other actions.
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say -
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[19] Further s. 6(5)(b) of the Limitation Act 1953 provides that nothing in this section shall apply to any action to recover money secured by any mortgage of or charge on land or personal property,

Whereas s. 21(1) of the Limitation Act 1953 reads:

> 21. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land.
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

[20] I am conscious of the dicta of His Lordship Abdul Wahab Patail, JCA in the Court of Appeal case of *WTK Holdings Bhd v. Foo Sae Heng & Anor* [2011] 5 CLJ 433 at p. 437:

> [4] As a matter of general principle, when the defence of limitation is raised, the burden is upon the party relying upon the cause of action so impugned to prove it is brought within the period of limitation. See *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504, applied in *BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 CLJ 599 CA.

[21] It is not in dispute that the facilities vested in the plaintiff are secured by way of the four debentures dated 10 July 1995 (pp. 366-455 of Core Bundle 2) and the supplemental debenture dated 29 January 1999 (pp. 289-294 of Core Bundle 1) executed by the defendant. Pursuant to the said debentures, all the assets, properties and undertaking of the defendant were charged in favour of the plaintiff, by way of fixed and floating charges.

[22] As rightly pointed out by learned counsel for the plaintiff, Miss Wong Chee Lin, legal proceedings were commenced by PhileoAllied Bank against BSN Commercial Bank (Malaysia) Berhad ('BSN") in 2000 (the plaintiff was substituted in place of PhileoAllied Bank and Affin Bank Berhad ("Affin") was substituted in place of BSN) and a sum of RM48,229,849.31 was paid by Affin to the plaintiff in July 2010 as can be seen at pp. 477-478 of Core Bundle 2).

[23] The learned counsel for the plaintiff explained that the said proceedings had emanated from a tussle between the plaintiff and Affin as to who had a first fixed charge over 8 million shares in a company known as Kuo Shinn Bricks Industries Sdn Bhd ("Kuo Shinn") which shares were acquired by the defendant after the execution of the debentures dated 10 July 1995 and pledged to BSN (thereafter Affin) by the defendant.

[24] It was held by the High Court and on appeal, upheld by the Court of Appeal, that pursuant to the debentures, the plaintiff has a first fixed charge over the said shares when they were acquired by the defendant which charge has priority over the subsequent charge in favour of Affin. All the debentures were duly registered under s. 108 of the Companies Act 1965. It was a specific finding of fact by the High Court and affirmed by the Court of Appeal that by way of a first fixed charge, the defendant had charged, *inter alia*, all shares then owned or thereafter acquired by it, under cl. 391)(f) of the debenture dated 10 July 1995.

[25] The grounds of judgment of the Court of Appeal in Appeal No. W-02-972-2002: are found at pp. 33-50 of the plaintiff's Bundle of Authorities. The Court of Appeal further set out the orders made by the High Court which were affirmed by the Court of Appeal:

> [2] On 25 November 2002, *vide* originating summons, Malayan Banking Bhd ("the plaintiff") obtained the following declaratory orders:
>
> (1) That the plaintiff's four debentures had created a fixed specific charge over 5.6 million and 2.4 million shares in Kuo Shinn Bricks Industries Sdn. Bhd. ("the 8 million shares"); and
>
> (2) That PhileoAllied Bank's charge over the 8 million shares has priority over the subsequent charge in favour of Affin Bank ("the defendant").
> (collectively "the declaratory orders"): ...
>
> [9] All the four debentures created by Wembley ranked *pari passu* with each other. In all the said debentures Wembley charged in favour of the debenture holders, by way of **a first fixed charge, *inter alia*, shares owned or thereafter acquired by it ...**

A

> [33] ... we ... hold that the decision of the learned judge is free from error. We therefore dismiss this appeal with costs and sustain the declaratory orders ... (emphasis added)

[26] The irrefutable evidence was that the said shares had been sold by Affin already and the High Court had on 31 May 2010 ordered that the sale proceeds with interest be paid by Affin to the plaintiff. The said order of the High Court is at pp. 471-473 of Core Bundle 2. It is also not disputed that pursuant to the said order the sum of RM48,229,849.31 was paid over by Affin to the plaintiff in July 2010 and the said payment was taken into consideration in reducing the plaintiff's claim against the defendant.

[27] I agree with learned counsel for the plaintiff that since the indebtedness of the defendant was at all material times secured by a charge over the assets, properties and undertaking of the defendant, the relevant period of limitation is 12 years under s. 21(1) of the Limitation Act 1953. Following s. 6(5)(b) of the said Act, the six years limitation period for actions founded on a contract is not applicable.

[28] No further authoritative pronouncement is necessary other than a reference to the Federal Court's case of *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd* [2005] 3 CLJ 825 where his Lordship Alauddin Mohd Sheriff FCJ (as he then was) set out the question for determination at p. 832 as follows:

> Question (1): Whether a claim for balance after sale is a claim founded on contract and therefore subject to the limitation period of six years under s. 6(1)(a) of the Limitation Act 1953 ('the Act') or a claim for money secured by charge on land and thereafter subject to the limitation period of 12 years under s. 21(1) of the Act?

[29] His Lordship continued at p. 834 as follows:

> Having had a close look at both sections mentioned above, we are of the view that s. 6 cannot apply in this case in view of the express exclusion of "any action to recover money secured by any mortgage of or charge on land" in s. 6(5)(b). The action is therefore not founded on a claim on contract under s. 6.
>
> In our judgment, the applicable provision is s. 21. Section 21(1) specifically refers to an action to recover moneys secured by a charge which is an action in personam, whilst s. 21(2) specifically refers to a foreclosure action in respect of mortgaged personal property which is an action in rem. The limitation period is

therefore twelve (12) years from the date when the right to receive the money accrued or twelve (12) years from the date on which the right to foreclose accrued respectively ...

[30] Her Ladyship Supang Lian, JC, in *CIMB Bank Berhad v. Goh Tai Pak & Anor* [2009] 1 LNS 1320 at pp. 2, 5 to 7 applied the ratio in: *Tan Kong Min's* case in this wise:

Defence of the 2nd defendant

... (i) that the action of the plaintiff against the 2nd defendant is time barred pursuant to the Limitation Act 1953, and ...

The Issues before the Court

... [9] Following from the evidence adduced at the trial, the agreed facts and submissions of both parties the issues for determination are:

(a) whether the action of the plaintiff is time barred pursuant to the Limitation Act 1953, ...

[11] Section 6 of the Limitation Act, 1953 provides as follows:

6. Limitation of actions of contract and tort and certain other actions.

(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say -

(a) actions founded on a contract or on tort;

...

(5) Nothing in this section shall apply to:

...

(b) any action to recover money secured by any mortgage of or charge on land or personal property.

[12] In my opinion, the reliance by the 2nd defendant on section 6(1) (a) of the 1953 Act is misplaced. In our present case, the action of the plaintiff against the defendants is to recover the loan amount under the term loan and overdraft facility which is secured by a mortgage. In *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd* [2005] 3 CLJ 825 the Federal Court decided that in view of the express exclusion of 'any action to recover money secured by any mortgage of or charge on land' in section 6(5)(b),

A section 6 cannot apply in actions for money secured by any mortgage or charge on land. Their Lordships observed further that such an action is not founded on a claim on contract under section 6. The applicable provision, according to their Lordships, is section 21 of the Limitation Act 1953 that provides as follows:-

B 21. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land.

(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to C recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

[13] In our present case, the action being an action to recover D monies secured by a mortgage, the applicable provision is section 21 (1) and not section 6. The limitation period is therefore 12 years from the date when the right to receive the money accrued. The next question that arises is when does the right to receive the money accrue? Put in another way, when does the cause of action accrue? With regard to this matter their Lordships in *Tan* E *Kong Min v. Malaysian Nasional Insurance Sdn Bhd, supra,* said at page 836 that, "it is established that the cause of action normally accrues where there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed." F In our present case, the plaintiff's solicitors on 19.5.1999 issued notices of demand to the defendants: one on the overdraft facility (P.12A) and the other on the term loan facility (P.12B). The time specified in the notices for the defendants to make payment is 14 days from 19.5.1999. The defendants did not pay up; hence, the solicitors on 16.7.1999 issued the notice of demand (P. 11) to G terminate and withdraw the facilities. In my considered opinion the cause of action accrued from the expiry of the time specified for payment in P. 12 A and B, and that would have fallen on 2.6.1999. The date of filing of the suit being 10.9.2004, the action is well within the limitation period allowed under section H 21(1) of the Act.

[14] In the event I am wrong in saying that the cause of action accrued from the time of the expiry of the notices of demand and the date should instead run from the time of default in making payment, as is the contention of the 2nd defendant, the action, in I my opinion, is still well within time. This is in view that the 2nd defendant had defaulted in the middle of 1998 and from then to the date of the filing of the action on 10.9.2004 is well within 12 years.

[15] The action of the plaintiff is therefore not statute-barred. A

[31] Then there is s. 21(5) of the Limitation Act 1953 to be considered with respect to a claim for interest for it provides that no action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge shall be B brought after the expiration of six years from the date on which the interest became due.

[32] The writ was filed on 24 February 2009 and so ordinarily the plaintiff could only claim interest due from 24 February 2003 until 24 February 2009 and not interest prior to 24 February C 2003. As the accounts are computed on a monthly basis, it would not be incorrect to say that interest due as at 28 February 2003 would be time-barred.

[33] As can be seen at p. 481 of Core Bundle 2 the total D amount due as at 28 February 2003 is RM 196,195,619.42 and this would comprise principal of RM150,877,707.71 and interest of RM45,317,911.71. The interest of RM45,317,911.71 would ordinarily have been time-barred. However a sum in excess of RM48 million was received by the plaintiff from Affin towards E reduction of the defendant's indebtedness.

[34] Pursuant to cl. 13.4 of the Supplemental Agreement at p. 261 of Core Bundle 1, the order of application of monies realised under security documents (defined to include the F debentures) is set out and such monies shall go towards payment of interest under cl. 13.4:2 before principal under cl. 13.4:3.

[35] Accordingly I agree with learned counsel for the plaintiff that the payment in excess of RM48 million will go towards payment of the amount of interest and since the payment is greater than G the amount of interest which would be time-barred, this means that none of the amounts claimed herein by the plaintiff would be time-barred in any event.

[36] The position is consistent with the common law position H enunciated in the rule in *Clayton's* case (1816) 1 Mer 572 and referred to with approval in *Re Footman Bower & Co Ltd* [1961] Ch 443 where Buckley J held at p. 450:

> ... the rule known as the rule in Clayton's case applies to any I current account and is, in my judgment, applicable to the present case. Consequently, in accordance with that rule, the various credits are *prima facie* to be treated as applied in the order in

which the debits and credits are set against each other in the account, each new credit being treated as discharging the earliest outstanding debit.

[37] As opined by the learned authors Terence Prime and Gary Scanlan in *The Law of Limitation*, 2nd edn., Oxford University Press at p. 68:

> The position where there is a running account is considered in the case of *Re Footman Bower & Co. Ltd* which concerned a running account maintained by a company in liquidation with a supplier. The company, pursuant to the arrangement it had with its supplier, made periodic payments in respect of the account. However, with its deteriorating financial position, some of the items with which the account was concerned had been supplied more than six years prior to the winding-up petition being lodged. On the other hand, the last payment on account had been made within six years of the longest outstanding item. It was held that a running account is a single account and not a composite of its various parts. A payment made on account of a running account is in respect of the entire outstanding balance, with the result that time is extended for the whole of the debt. It appears, therefore, that a running account will become statute-barred only if more than six years elapse between the supply of the last article under it and the last payment on account.

[38] Learned counsel for the defendant submitted that the plaintiff had been classified as an "unsecured financier" in the DRA where in schedule 3 thereof the details of the debt owing to the plaintiff under the heading of "unsecured financiers" is set out in detail as at 31 December 2001.

[39] It must be noted that by that time the security of the shares of the defendant had been disposed of and so for purposes of classification of the financier in question, it is not incorrect to have categorized the plaintiff under the rubric of "unsecured financiers". However it does not derogate from the fact that the amount outstanding had been claimed from a facility that had been secured by way of a debenture as is amply evident from the documents referred to.

[40] Learned counsel for the defendant also referred to the announcement made by the defendant to Bursa Malaysia dated 30 June 2005 wherein the plaintiff had been referred to under the rubric of "unsecured financiers". It was submitted that the plaintiff had not subsequently written to Bursa Malaysia to correct the classification.

[41] Whatever might be put in the public announcement of Bursa Malaysia at the behest of the defendant is none of the plaintiff's concerns. The company making the announcement has to ensure the timeliness, truthfulness and thoroughness of the announcements made with respect to material disclosure. As I said before that announcement cannot derogate from the substance of the nature of the facility in question in that it started off as a secured facility with the debentures duly registered under s. 108 of the Companies Act 1965.

[42] Indeed the defendant through its learned counsel had subsequently abandoned this line of argument as to proceed further would be to refute the irrefutable and to deny the undeniable.

[43] I therefore held that the claim of the plaintiff should be allowed as it was made well within the limitation period of 12 years and also for the reasons given with respect to the interest outstanding.

Whether The Recitals (B) And (C) In Question And Clause 10.1 Survive The DRA That Had Not Been Carried Through And Indeed Had Lapsed

[44] It is not in dispute that the DRA was executed and that in recitals (B) and (C) and cl. 10.1 thereof, there was an acknowledgment of debt by the defendant. The conditions precedent in the DRA were not fulfilled and there being no extension of time for the defendant to comply with the conditions precedent, the plaintiff was discharged from all its obligations to the defendant as provided under cl. 2.5 and the DRA was terminated under cl. 2.6.

[45] The argument of the defendant is that cl. 2.6 provided that:

> At any time after this Agreement is terminated pursuant to Clause 2.5 above, each of the Financiers and Creditors shall be entitled:
>
> (a) To make demand on the respective Group Member ... or Security Party for the immediate payment or repayment of all outstanding indebtedness due to it under or arising from the Facilities ... **as if this Agreement had never been entered into ...** (emphasis added)

[46] To the defendant cl. 2.6 when referring to "... as if this agreement had never been entered into ..." means that for all intents and purposes, as the agreement had been terminated through no-fulfilment of conditions precedent, it was as if there had never been the DRA at all in the first place. As a consequence the recitals (B) and (C) as well as cl. 10.1 are no more because in as much as the DRA had never been entered into, so also those recitals and cl. 10.1 had never been there to begin with!

[47] Learned counsel for the plaintiff was resolute in stressing that this is not a case of the plaintiff trying to enforce or make a claim against the defendant based on the provisions of the DRA. She pointed out that she is not disputing that once the DRA had been terminated, the future obligations and rights of the parties in the DRA are discharged. However she stressed with all the emphasis she could command, that it cannot be denied that as a matter of fact, the defendant had acknowledged the plaintiff's claim against it.

[48] The learned author JW Carter in *Breach Of Contract*, The Law Book Company Limited, 1984 at pp. 437-438 explained what happened upon a termination of a contract as follows:

> (a) Discharge through termination
>
> [1201] Discharge of parties' duties.
>
> ... The primary effect of a termination of the performance of a contract for breach or repudiation is to discharge the parties from the obligation to perform their respective contractual duties. This is expressed by saying that the contract is "terminated", "at the end" or "rescinded". However, such statements cannot be taken literally since the contract does survive termination. As Lord Porter explained in *Heyman v. Darwins Ltd* [1942] AC 356 at 399:
>
> > To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the

> root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded.
>
> Since the contract remains in existence, any contractual terms which were intended to deal with the consequences of breach or termination must be taken into account.

[49] In *McDonald v. Dennys, Lascelles Ltd* [1933] 48 CLR 457 at pp. 476-477 Dixon, J, explained the distinction between termination and rescission:

> When a party to a simple contract, upon a breach by the other contracting party of condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.

[50] It would appear that conditional contracts under our law are governed by ss. 33 to 36 of the Contracts Act, 1950. Section 33 and 36 provide as follows:

> **33. Enforcement of contracts contingent on an event happening.**
>
> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.
>
> **36. When contracts become void which are contingent on happening of specified event within fixed time**.
>
> (1) Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible.
>
> **When contracts may be enforced which are contingent on specified event does not happen within a fixed time.**
>
> (2) Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time

A may be enforced by law when the time fixed has expired and the event has not happened, or, before the time fixed has expired, if it becomes certain that the event will not happen.

B **[51]** His Lordship Salleh Abas, CJ. in the Federal Court case of *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 and pp. 217 to 220 explained the consequences flowing from the non-fulfilment of a condition in a conditional or contingent contract:

C What then is the effect upon the agreement of the non-approval by the FIC? Clause 2(b) of the agreement which deals with this matter is silent as to whether the agreement would be valid or not, but it does contain a proviso that "all monies paid by the purchaser hereunder shall be returned to the purchaser in the event that such approval as aforesaid is not given by the Foreign D Investment Committee." Thus, if the appellants are required to refund the deposit it goes without saying that in the event the appellants need not have to pay the balance and that the respondents need not have to comply with the provisions of clause 3 of the agreement, i.e. to complete it. In other words, the parties E are under no obligation to complete the transaction and the agreement may be then regarded as void or abandoned or to use the respondents' expression "aborted".

It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the F FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and G to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. (See *Trans Trust SPRL v. Danubian Trading Co Ltd* [1952] 2 KB 297 304-- per Denning, LJ – and *Property and Bloodstock Ltd v Emerton Bush v. Property and Bloodstock Ltd* H [1967] 3 All ER 321 330 – per Sachs, LJ. Until the FIC approval was given liability for further performance remained unenforceable, ie, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in I effect laid down by s. 33(a) of the Contracts Act which enacts:

33.(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with section 33(b) of the Contracts Act, which is as follows:

> 33.(b) If the event becomes impossible, such contracts become void.

We draw much support from *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1960] MLJ 47 which we think is on all fours with the case under the present appeal; the only difference being that in *Aberfoyle's* case the parties expressly agreed that in the event of the non-fulfilment not only was the purchaser entitled to the refund of the deposit but that the agreement itself would become null and void. Whereas in the case under the present appeal the parties made no reference at all to the voidness or nullity of the agreement. This silence, in our view, is of no consequence because it is implicit that the validity or otherwise of the agreement depends entirely upon the general principle of the law of contract relating to the nature and effect of this sort of stipulation.

... The question is therefore whether the requirement as to FIC approval for completion of the proposed sale is a contingent condition or a promissory condition. A contingent condition, as we have already referred it, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in damages to the other; whilst a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to break itself as discharged from the contract and to sue for damages.

However, even if we hold that the requirement as to FIC approval is no more than a term -- essential term of the agreement, the result would still be the same. If it is a mere term of the contract the non-approval by FIC of the deal certainly defeats the sale because such an approval would then constitute a supervening event rendering the contract void under section 57(2) of the Contracts Act. This view was in fact expressed by Lord Danckwerts in *Property & Bloodstock's case (supra)* when he said:

> Of course, if the necessary consent by the landlords to the assignment cannot be obtained, it defeats the sale, but this is a supervening event.
> (p. 329C)

A Thus in so far as the principal issue is concerned whether we hold the requirement as to FIC approval is a contingent condition as in *Aberfoyle's* case or as a mere promissory condition -- i.e. mere term of the agreement as in *Property and Bloodstock's* case *(supra)* the result would not be different. In the first case there was no agreement to enforce until the requirement was satisfied and the deposit was returnable under the provision of the agreement itself as there was no ground for withholding it any longer; whereas in the second case although there was a subsisting contract, it was, however, defeated or frustrated by a supervening event, which is the non-fulfilment of the requirement, and in this case also the deposit was refundable as money held and received for the use of the appellants who paid it (see section 15(2) of Civil Law Act).

[52] Reference can also be made to the Federal Court case of *Jaafar Ibrahim v. Gan Kim Kin* [1985] 2 MLJ 24 and to the Court of Appeal case of *Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd* [2003] 3 CLJ 201 on the true nature of a conditional or contingent contract.

[53] The expression used here is that if the condition is not fulfilled then the contract becomes void and is unenforceable. It does not however mean that there was never such a contract that had been entered into at a particular point in time in history. It only means now that for non-fulfilment of a condition, the contract is void.

[54] Thus it cannot be said that there was never a recital (B) and (C) and cl. 10.1 in the DRA. It only means that the DRA cannot be enforced because parties are released from their obligations under it.

[55] If the question is asked, "has the defendant made an admission as to its liability or indebtedness to the plaintiff in recitals (B) and (C) and in cl. 10.1?", the answer would have been "yes, the defendant did". It was something factual at a particular point in time in history on 15 October 2004 when the DRA was signed by both the plaintiff and the defendant. Nothing can erase or expunge or extinguish that historical fact of admission.

[56] The expression in cl. 2.6(a) of the DRA "... as if this agreement had never been entered into; ..." must be interpreted in the context of the clause which has reference to the plaintiff making a demand for "... immediate payment or repayment of all outstanding indebtedness due to it under or arising from the

facilities ... together with interest thereon ..." In such a context, there is nothing impeding the plaintiff from so proceeding as if this DRA had never been entered into. If the immediate context gives the rationale for the use of the expression, there is no need to stretch the expression to erase and expunge every clause in the DRA including the recitals (B) and (C) and cl. 10.1.

[57] Further it does not make commercial sense to the plaintiff to on the one hand give extension of time for the defendant to pay based on the restructured facilities and on the other hand consenting to the defendant being able to dispute the amount said to be owing which amount is the subject matter of the restructuring exercise. It would be an exercise in futility for a lender to restructure a debt of its borrower where the borrower is not acknowledging the sum to be restructured as the sum owing to the lender. Conversely why would the defendant enter into a restructuring exercise on a debt which amount it is disputing?

[58] I am not unaware of a contrary view expressed in *RHB Investment Bank Bhd & Ors v. Plaza Rakyat Sdn Bhd & Anor* [2011] 1 LNS 600 where His Lordship Mah Weng Kwai JC (as he was then) opined as follows:

> 4.1.5 The Court is of the considered view that as the DRA had become void, the Plaintiffs cannot elect to treat the acknowledgement of the debt contained therein as still subsisting.

[59] I held that the recitals (B) and (C) and cl. 10.1 of the DRA survive the termination of the DRA and the defendant is estopped from denying what is being acknowledged there, when the plaintiff sued based on existing documents and the Supplemental Agreement dated 29 January 1999.

Whether There Was A Clear And Unequivocal Admission Acknowledgment Of Debt In Recital (B) And (C) And Clause 10.1 Of The DRA Within The Meaning Of Section 26(2) Limitation Act 1953

[60] Section 26(2) of the Limitation Act 1953 reads:

> 26. Fresh accrual of action on acknowledgment or part payment.
> (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefore acknowledges the

A claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

> Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the
B remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt.

C **[61]** Recital (B) of the DRA reads:

> Each of the financiers (this includes the Plaintiff) has made loans, financing and/or credit facilities to or acquired loans and/or credit facilities granted either to the Company (Defendant) or ... and as at 31st December 2001, the debt due and owing by the Company
D ... to each of the Financiers and/or in respect of which the Company is liable ... is as shown under the financing ... in Schedule 3 hereto ...

[62] Recital (C) of the DRA reads:

E > The Company and/or each Subsidiary have debt due and owing to each of the Creditors and the amount of the debt as at the 31st day of September 2001 is as shown under the Creditors section in Schedule 3 hereto.

F **[63]** I agree that the statements of fact in recitals (B) and (C) are clear, unambiguous and definite. So is the acknowledgment in cl. 10.1 of the DRA (p. 345A of Core Bundle 1) which reads:

> 10.1 The Company and PRSB hereby acknowledge and admit that the amount of indebtedness owing by each of them to the
G Financiers and Creditors under or in respect of the Facilities and the Non-Financing Documents respectively as at the 31st day of December 2001 are set out in the fifth (5th) column of Schedule 3 hereto.

[64] The amount owing by the defendant to the plaintiff as stated
H in schedule 3 showed the sum of RM180,927,332 as at 31 December 2001, comprising principal of RM125 million and interest of RM55,927,332.

[65] I agree with learned counsel for the plaintiff that statements
I in recitals are not obligations. They are statements of fact which parties are bound by estoppels from denying. In *The Interpretation*

of Contracts, 2nd edn., London Sweet & Maxwell 1997 the learned author Kim Lewison QC explained at pp. 275-276 as follows:

> Where a recital is intended to be a statement of all parties, all parties are estopped from denying the truth of the recital. But where the recital is the statement of one party only, only that party is so estopped.
>
> In *Greer v. Kettle* [1938] AC 156 Lord Maugham said:
>
> > Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies and therefore as not admitting any contradictory proof.
>
> However, the mere fact that a deed recites a certain fact or state of affairs does not necessarily mean that all parties to the deed are estopped from denying its truth. In *Stroughill v. Buck*, (1850) 14 QB 781 Patterson J. said:
>
> > When a recital is intended to be a statement which all parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument.
>
> Indeed, in *Greer v. Kettle* itself, a surety was held not to be estopped by a recital in the deed of guarantee that the loan guaranteed was comprised in a certain charge.
>
> In addition, in order to found an estoppel the recited statement must be clear and definite. In *Onward Building Society v. Smithson* [1893] 1 Ch 1 at 14 Bowen L.J. said:
>
> > It would be very dangerous to extract a proposition by inference from the statements in a deed, and hold the party estopped from denying it; estoppel can only arise from a clear, definite statement. For instance it is not enough to say that a vendor is well entitled in fee at law or in equity: he cannot be estopped from denying that he has the legal estate unless there is an express statement in the deed that he has it.

[66] What amounts to a good acknowledgment of a debt was decided in the case of *Good v. Parry* [1963] 2 All ER 59 where the Court of Appeal in England at p. 61 held that:

> ... A person may acknowledge that a claim has been made against him without acknowledging any indebtedness. It is clear that what the Limitation Act, 1939, means is "acknowledges the debt or other liquidated pecuniary amount". The question is: Is there such an acknowledgement? This statute alters the old law. Previously, in order to get a case out of the statute, a creditor had to show a writing from which there could be implied a promise to pay; then his cause of action was on the promise and not on the previous debt, and so long as the promise was within the six years, all well and good: see the notes to *Whitcomb v. Whiting* (4). Nowadays, as the result of this new Act, there is no necessity to look for a promise, express or implied. There need only be an acknowledgment of a debt or other liquidated amount. That means, I think, **that there must be an admission that there is a debt or other liquidated amount outstanding and unpaid.** Even though the debtor says in the same writing that he will never pay it, nevertheless it is a good acknowledgment. *In order to be an acknowledgment, however, the debt must be quantified in figures or, at all events, it must be liquidated in the sense that it is capable of ascertainment by calculation, or by extrinsic evidence, without further agreement of the parties.* (emphasis added)

[67] The above case was cited with approval in the Federal Court case of *Wee Tiang Teng v. Ong Chong Hooi & Anor* [1978] 1 LNS 234 where on the facts the court held at p. 56:

> With respect we are of the opinion that the letter in question before us was not a sufficient acknowledgment within our section 26(2). By it the defendants acknowledged that a claim had been made against them, they did not acknowledge that they were indebted to the plaintiff, and even if it was an acknowledgment the debt acknowledged was not quantified in figures, nor was it capable of ascertainment by counterclaim or by extrinsic evidence without further agreement of the parties.

[68] The facts of *RHB Bank (Malaysia) Bhd v. MOCCIS Trading Sdn Bhd* [2011] 1 LNS 278 are more relevant to the present case as it dealt with a Debt Restructuring Agreement. His Lordship Dr Hamid Sultan J set out the relevant facts and his findings in an O. 14 application as follows:

> 1. As early as 1996 the plaintiff had granted to the defendant a Revolving Credit Facility (RCF1) and (RCF2) of RM20 million each. The facilities were secured by assignment of

contract papers (ie, receivables). The defendant had difficulty in honouring its commitments and in consequence as early as the year 2002 set terms for restructuring of RCF1 and RCF2. The defendant could not comply with the terms necessary for restructuring to take place. A

2. In the instant case *inter alia* paragraph 19 of the defence to counterclaim must also be read to appreciate the defendant's case. And also the fact that no objections on issues relating to triable issues were taken at the earliest opportunity to appreciate the genuineness of the defence and counterclaim. B

3. About the year 2005 the defendant entered into a Debt Restructuring Agreement with the plaintiff and 17 other financial institutions. Here, *it must be noted that the defendant had expressly acknowledged and admitted the sums due and owing to the plaintiff in respect of RCF1 and RCF2 and that such sums due as at 30.6.2004 were RM22,632,096.41 and RM17,031,319.04 respectively*. C D

4. As per the Debt Restructuring Agreement the defendant was given the indulgence to repay the loans from receivables (defendant's debtors) to be paid into an account of defendant's name and all the loans must be paid over a period of 5 years. E

5. The Debt Restructuring Agreement also provided for the appointment of a Monitoring Accountant, who was expressly agreed upon to be the defendant's agent. The Monitoring Accountant was to monitor the defendant's collection of the outstanding receivables and to arrange for payment of sums collected out of the defendant's account, to the financiers. The plaintiff had received a sum of RM485,151.65 from the monitoring accountant before the accountant was terminated by the defendant. The plaintiff complains that after the termination, the defendant has failed to remit any further payments to the plaintiff whether from collected receivables or otherwise. F G

6. The plaintiff says the defendant had committed the events of default under the Debt Restructuring Agreement *inter alia* as follows: (i) failed to pay the sums as required under the agreement; and (ii) suspended and/or terminated the services of monitoring accountant in breach of the terms of the agreement. H

7. The plaintiff says, in consequence of the events of default occurring the financiers can terminate the agreement. And the financiers had terminated the Debt Restructuring Agreement by a letter dated 7.5.2009 through their solicitors. I

A

8. Upon termination the financiers are entitled to demand all sums outstanding from the existing facilities. The plaintiff by its solicitor's letter dated 1.10.2010 had demanded full payment of the sum due and owing under RCF1 and RCF2.

B

9. The plaintiff has summarised the triable issues raised by the defendant as follows: (i) the plaintiffs action is time-barred and there was no admission of debt by the defendant; (ii) value of the assigned receivables has not been accounted for by the plaintiff; (iii) error in the amount outstanding and certificate of indebtedness; (iv) letters dated 4.9.2003 and 7.5.2009 are defective; (v) plaintiff was negligent by failing to monitor the conduct of the Monitoring Accountant, and in failing to enforce the receivables.

C

10. ... I have read the application, affidavits and submission of the parties in detail. I take the view that the plaintiffs application must be allowed. My reasons *inter alia* are as follows:

D

(a) The defendant's allegation of triable issues is not supported by contemporaneous objections or documents at the relevant period. And the arguments raised are misconceived taking into consideration the terms of the Debt Restructuring Agreement, **and clear admission of liability for the respective sums set out in the Schedule.** It is trite that mere allegation without supporting documents cannot stand as triable issues. In addition the allegations raised militate against the agreed terms.

E

F

(b) The defendant's argument on limitation is misconceived taking into consideration *that time to commence the action under the Debt Restructuring Agreement will arise only upon the plaintiff making the demand. The demand in the instant case was made on 1.10.2010 and I agree with the submission of the learned counsel for the plaintiff that there is no question of any limitation period setting in, taking into consideration the acknowledgment of liability as well as section 26 of the Limitation Act 1953* and the terms agreed by the parties. (emphasis added)

G

H

[69] In the light of the reasons given above, it is my finding that there has been a fresh acknowledgment of debt in recitals (B) and (C) and in cl. 10.1 within the meaning of s. 26(2) of the Limitation

I

Act 1953. Thus even if the action has to be brought within six years of the accrual of the cause of action, it has been

brought within time because of the fresh accrual of the action on 15 October 2004 when the DRA was signed by the plaintiff and the defendant. The writ was filed on 24 February 2009 and so filed within time.

Pronouncement

[70] The defendant at the outset of the trial has confirmed that it is not disputing the correctness of the sum claimed except to maintain that the claim is time-barred. The plaintiff's officer-in-charge had signed a certificate of indebtedness at p. 491 of Core Bundle 2 confirming the amount due as at 31 December 2010 as RM328,181,556.09 with interest thereon at the rate of 2.15% per annum above the plaintiff's base lending rate (BLR) from 1 January 2011 until full and final settlement.

[71] In the light of the above I granted judgment to the plaintiff for the sum of RM328,181,556.09 as at 31 December 2010 with interest at the rate of 2.15% per annum above BLR from 1 January 2011 till realization.

[72] As for costs it is provided in cl. 17 of the Supplemental Agreement (p. 268 Core Bundle 1) and in cl. 4(B) of the Facility Agreement (p. 16 of Core Bundle 1) that the plaintiff is entitled to costs on a solicitor-client basis. I therefore allowed costs on a solicitor-client basis to be taxed failing agreement.